STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

MELVIN HOWARD

Defendant-Appellant.
_____/

Supreme Court No. 153651

Court of Appeals No. 324388

Lower Court No. 13-1442FH

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Attorney for Plaintiff-Appellee
_____

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_____

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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Statement Of Facts

Defendant-Appellant incorporates the statement of facts set forth in his Application for Leave to Appeal, focusing in this brief on the facts central to the mistrial issue.

The complainant in this case, Mariah White, alleged that she and her friend Sharonda Street, planned to hang out at Ms. Street's Ypsilanti apartment to smoke marijuana and drink. At some point, they went to a local store where they ran into several people, most of whom she did not know, including Mr. Howard. They invited the people back to Ms. Street's apartment, where they drank alcohol and smoked marijuana. Ms. White became very intoxicated and, after vomiting at least twice, went to sleep on the living room sofa. She testified that she awoke to Mr. Howard sexually assaulting her.

Mr. Howard told police that he and Ms. White had consensual sex, and in the second trial a defense witness would confirm his statement that Ms. White had been flirting with him and invited him to stay over. The opening statements in the first trial made it clear that this would be a he said/she said case for the jury.

Ms. Street testified for the prosecution in an effort to corroborate Ms. White's testimony. She testified that during the gathering at the apartment, she saw no flirting or even much interaction between the complainant and Mr. Howard. T1 197-198. At some point, she kicked everyone out of the apartment after Ms. White fell asleep on the living room couch. T 1 199-202.

After locking up the apartment, Ms. Street went to bed. Early the next morning, Ms. White woke her up by pounding on the door. Ms. White was extremely upset, and crying, and kept yelling "he raped me....he raped me," meaning Mr. Howard. T 1 202, 207-209, 216-217, 219.

On cross examination, Ms. Street admitted that she had spoken with the prosecutor about her testimony in the company of her good friend, Ms. White. T1 209-210. At some point, she became confrontational and evasive with defense counsel, which prompted the court to admonish

her that she could not "keep coppin' an attitude" and would be kicked out if she did so. T 1 221. After a recess, Ms. Street retook the stand with the admonition to "testify honestly, and stop arguing with me, with the lawyers, and evading the questions." T 1 222. She was warned her failure to do so would lead to being held in contempt of court. T 1 222.

After cross-examination ended, the court asked Ms. Street pointed questions about the purchases at the party store, particularly the liquor. T 1 233-234. Ms. Street responded, "I don't remember" several times and the court expressed disbelief. T 1 233-234. During this questioning, the prosecutor asked to approach the bench. T 1 234. After an approximately two minute bench conference, the court excused the jury and Ms. Street from the court room. T 1 234.

After the bench conference, the prosecutor disclosed that during the previous recess, the parties and the judge had discussed Ms. Street's testimony and the judge had indicated that he thought Ms. Street was not being truthful. The prosecutor further explained that after Ms. Street's testimony recommenced, it came to light that she had testified falsely when she stated that liquor for the gathering had been purchased at Campus Corners, a store that did not in fact sell liquor. The prosecutor also alleged Ms. Street had falsely testified that she did not have a phone at the time of the incident, when in fact she had provided a phone number to investigators and Ms. White had indicated that she had a usable phone. The prosecutor deferred to the court the decision what to do about the false testimony, but expressed concern that the false testimony might affect the testimony of the complainant. T 1 235-238.

Without asking defense counsel for input, the court *sua sponte* declared a mistrial, explaining that Ms. Street's testimony "taints this jury to the degree that I don't think it's fair either to Mr. Howard or, frankly, to Ms. White's complaint to allow this matter to go to the jury on this basis." T1 238-239. From start to finish, including the witness leaving the courtroom, the entire discussion lasted seven minutes. With that, the trial court concluded the first trial. T1 239.

Neither trial counsel, nor Mr. Howard spoke on the matter, and no inquiry was made of them. T 1 235-239.

Ms. Street did not testify at the second trial.

Following Mr. Howard's conviction at the second trial, sentencing was held before a different judge. There, defense counsel moved for a judgment notwithstanding the verdict because the victim's testimony lacked credibility. S 11, 14. The trial court asked trial counsel if he was suggesting there was a double jeopardy issue, to which trial counsel responded that he believed there was an argument that double jeopardy was violated. He also insisted that he had not "waived objection" to the mistrial declaration. S 16, 18. Defense counsel conceded that he had not specifically filed a motion to dismiss on double jeopardy grounds. S 16, 18.

The trial court denied the motion for a judgment notwithstanding the verdict and noted that he had no knowledge of the case as he was a visiting judge. S 18-19. He reiterated his suggestion that counsel to file a motion regarding the double jeopardy issue and said he would consider it at that time. S 19. Trial counsel never filed the motion.

I. The Trial Court Erred In *Sua Sponte* Declaring A Mistrial. Retrying Mr. Howard Therefor Violated His Double Jeopardy Right. "False" Testimony By A Prosecution Witness On A Minor, Collateral Matter Could Easily Have Been Cured And Did Not Create Any Irregularity That Would Have Required Reversal On Appeal. The Trial Court Failed To Give Consideration To Such Curative Measures, And Thus Mistakenly Evaluated The Effect Of The False Testimony On The Jury In Its Uncorrected State. Moreover, The Reasons Behind The Mistrial Declaration – To Prevent Negatively-Impacting The Complaining Witness's Credibility And Amorphous Notions Of "Fairness" To The Complainant And The Defendant – Did Not Constitute "Manifest Necessity" For A Mistrial.

Issue Preservation/Standard of Review

The plain error standard of review applies in the absence of an explicit objection to the mistrial declaration. *People v Carines,* 460 Mich 750, 763-764 (1999).

The constitutional question of whether Double Jeopardy was violated is one of law reviewed *de novo. People v Lett*, 466 Mich 206, 212 (2002). A trial court's decision to declare a mistrial is reviewed for an abuse of discretion. *People v Nash,* 244 Mich App 93, 96 (2000). The trial court abuses its discretion where it chooses an outcome that is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269-270 (2003).

Argument

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb..." Once a jury is empaneled and sworn, jeopardy attaches and the defendant in most instances is entitled to a trial and verdict by that one and only jury. *Crist v Bretz* 437 US 28, 35 (1978) c*iting Downum v United States*, 372 US 374 (1963); *United States v Jorn*, 400 US 470 (1971); *Arizona v Washington,* 434 US 497 (1978). The defendant has a "valued right" to a single trial protected by the Constitution. *Washington*, 434 US at 503-504. Subjecting the defendant to multiple trials can be "grossly unfair"

by increasing "the financial and emotional burden" on the defendant and "prolong[ing] the period in which he is stigmatized" by having charges pending against him." *Washington,* 434 US at 503-504 (internal citations omitted). Multiple trials "may even enhance the risk that an innocent defendant may be convicted." *Id.* at 504.

In certain circumstances, the court may declare a mistrial if an irregularity occurs such that the "ends of justice" demand it. The most common is when a jury is deadlocked. *See eg Lett v Renico*, 559 US 788 (2010). A judge may also declare a mistrial in other circumstances, such as where "an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Illinois v Somerville,* 410 US 458, 464 (1973).

But in all cases, the power to terminate trials must be used sparingly. If a trial is terminated short of a verdict, Double Jeopardy bars a retrial unless either the defendant waives his "valued right" to the first trial or there is "manifest necessity" to declare a mistrial. *People v Dawson*, 431 Mich 234, 252-253 (1988). The term "manifest necessity" was first used by the United States Supreme Court to define a situation that presented "urgent circumstances." *United States v Perez*, 22 US (9 Wheat.) 579 (1824). To protect the accused, the court must first consider "all the circumstances." *Id.* Furthermore, the power to declare a mistrial:

> ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner.

Id. As the Court subsequently explained, "manifest necessity" means a "high degree" of necessity: "we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington*, 434 US at 506. "The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking

circumstances.'" *Downum*, 372 US at 736 (quoting *United States v Coolidge*, 25 Fed Cas 622, 633 (1815)).

Because there are "varying and often unique situations arising during the course of a criminal trial," courts have rejected a "mechanical" approach or bright line rule for determining whether a trial court exercised "sound discretion" in declaring a mistrial. *Somerville*, 410 US at 462. But *Perez*'s directive that "all the circumstances" be considered and mistrial declarations be treated with the "greatest caution" serves "as a command to trial judges" not to declare a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 US at 485. The judge must give highest consideration to "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate," *Jorn*, 400 US 470 at 486, and "resolve any doubt" in favor of the defendant. *Downum*, 372 US at 738.

While there is no required "checklist" to follow or need for a court to make explicit findings, a record reflecting that the judge did not consider and weigh options for remedying an irregularity short of declaring a mistrial is symptomatic of a "precipitate" mistrial ruling and therefore, an abuse of discretion. *Jorn,* 400 US at 486-487. In *Jorn*, for example, the trial judge declared a mistrial *sua sponte* after concluding that some of the government's witnesses did not understand their Fifth Amendment rights, in order to allow said witnesses to consult with attorneys before deciding whether to testify. 400 US at 482-83. In finding a lack of manifest necessity, the US Supreme Court held that the trial judge gave absolutely "no consideration" to the alternative of a trial continuance and "indeed . . . acted so abruptly in discharging the jury" that the parties were given no opportunity to suggest the alternative of a continuance or to object in advance to the jury discharge." *Id.* at 487. Therefore, "the trial judge made no effort to exercise a sound discretion to

assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *Id.* (emphasis added). See also *Somerville*, 410 US at 481 ("Once it is shown that alternatives to the declaration of a mistrial existed, as they did here, we must consider whether the reasons which led to the declaration were sufficient, in light of these alternatives to overcome the defendant's interest in trying the case to the jury." (Marshall, J., dissenting).

In *Washington*, on the other hand, the Court held that a mistrial declaration is not constitutionally defective merely because a trial judge fails to "articulate on the record all the factors which informed the deliberate exercise of his discretion." 434 US at 517. It did insist, however, that the trial record provide "sufficient justification" for the mistrial ruling that reflected consideration of those alternatives. *Id.*

There is a "sliding scale of scrutiny" of mistrial declarations based on the reasons cited by the trial court. *Colvin v Sheets*, 598 F3d 242, 253 (CA 6, 2010); *United States v Capozzi*, 723 F3d 720, 727 (CA 6, 2013). Mistrial declarations due to a deadlocked jury – "the classic basis for a proper mistrial[]" – are afforded the most appellate deference. *Downum,* 372 US 734 at 735-36. On the other end of the spectrum, courts apply the strictest scrutiny when the basis for the mistrial is, for example, "the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Washington*, 434 US at 508. As shown below, the source of the problem here was the prosecution's bad witness, and it appears that a mistrial was declared wholly or in part because her less-than credible testimony would potentially harm the State's case. Thus, this case is more like those where prosecution evidence is missing, or where there a less-than legitimate rulings done to gain some tactical advantage over the defense. Strict scrutiny is therefore required. *Washington,* 434 US at 508.

Applying the correct level of scrutiny reveals there was not manifest necessity for the mistrial declaration. The record reflects that during Shoronda Street's cross-examination a recess was taken and in chambers Ms. Street's veracity, or lack thereof, was discussed. T1 234. Then after cross examination the court asked questions about the purchase of liquor at the party store during which the court expressed skepticism about Ms. Street's lack of recall. T 1 233. A bench conference occurred and the prosecutor notified the court that he had identified two instances in which Ms. Street had given tangibly incorrect testimony: a) she remembered someone from the group purchasing liquor from a store that in fact, did not sell liquor; and b) she claimed she did not have a phone at the time when police reports and other evidence indicated she had a functioning phone and phone number. *Id.* at 234-235.

The prosecutor deferred to the court the decision what to do about Ms. Street's alleged misrepresentations, but expressed his concern over,

> "[w]hether or not this [the false testimony] impacts on the complaining witness's testimony. That would be the ***only*** thing that I would ask the Court to consider before you make the ruling..... whether this problematic testimony necessarily impacts the testimony from the complaining witness, Mariah White."

Id. at 237-238 (emphasis added). The court did not solicit input from the defense. Instead, the court *sua sponte* declared a mistrial, explaining:

> My concern, frankly, is having this issue, which is an important issue, go to the jury with the status of this testimony and -- and this -- and this witness. Frankly, I -- let me back up. I thank you, Mr. Holtz for bringing it to the Court's attention. You are an ethical attorney, and you always have been in this court, and I respect that. Nothing that happened here is -- not only is not the fault of the Prosecutor or the police, but -- they have both been forthcoming with the Court. My concern is that the status of this testimony taints this jury to the degree that I don't think it's fair either to Mr. Howard or, frankly, to Ms. White's complaint to allow this matter to go to the jury on this basis.

> I'm going to declare a mistrial in this matter. Pretrial will be set for April the 8th at 1:30.

T1 238-239.

Thus, what prompted the mistrial was Ms. Street's alleged false testimony, which created three perceived harms: 1) Adverse impact on the complainant's testimony, most likely her credibility; 2) The court's belief that the resultant "taint" on the jury would be "unfair" to the complainant; and 3) The same concern that it would be "unfair" to Mr. Howard to proceed. T1 237-239. Notably absent was any indication that Mr. Howard's "valued right" to one trial before this jury was factored into the equation at all. *Washington,* 434 US at 503-504. Indeed, the defense was not given any opportunity to speak.

The process used by the court to produce its mistrial declaration was precipitate and did not support a "high degree" of certainty; moreover, Ms. Street's alleged perjury did not present the extreme circumstances necessitating a mistrial. While the prosecution's knowing presentation of false perjured testimony can taint the fairness of the trial, *see People v Smith,* 498 Mich 466 (2015), it is normally only when false testimony goes to the jury *uncorrected* that a trial is rendered fundamentally defective. *Id.* at 477. Even then, a retrial must be ordered if the uncorrected false evidence is so material that there is a "reasonable likelihood" that it affected the verdict. *Id.* at 483-485.

The judge here made no attempt to correct the false testimony, and the record does not reflect that he even considered curative measures. This failure is a clear symptom of an abuse of discretion. *People v Hicks*, 447 Mich 819, 841 (1994). The court's failure to solicit input from the defense is further evidence that the court did not scrupulously exercise its discretion. T1 235-237; *see Jorn,* 400 US at 485.

Curative measures were obviously available. Since Ms. Street was still on the stand when the false statements were brought to light, the prosecutor could have used redirect to bring the discrepancies to Ms. Street's attention and elicit an explanation from her, as well as a retraction. *See* MCR 6.11(d)(1), (3) (permitting leading questions on direct in certain circumstances, including when there is a hostile witness); *see also* MCR 607 (allowing party to impeach own witness). The defense could have cross-examined her, calling those explanations into question, but that is, of course, what happens at trials. The prosecutor could also have put the lead detective or another officer on the stand to set the record straight for the jury. The parties could have entered into a stipulation for the jury as to the corrected facts. M Crim JI 4.7. Or the judge himself could have notified the jury as to the correct facts, or ordered the false testimony stricken, and instructed the jury to disregard it. *People v Benton*, 402 Mich 47, 61–62 (1977) (noting that mistrial should not be declared where curative instruction could have addressed the irregularity). It is well-established that this Court must presume the jury would have followed that instruction and deliberated the case based on the corrected record, and there is nothing from which to conclude it would not in this case. *See People v Breidenbach,* 489 Mich 1, 13 (2011).

Rather than take these measures, or even consider them, the judge jumped straight to the most extreme remedy of a mistrial, claiming "the status of this testimony taints this jury to the degree" that it would be unfair to Mr. Howard and to the complainant to continue. T1 238-239. But the "status" of Ms. Street's testimony could be changed and indeed remedied through the corrective measures outlined above, and there is no reason to believe any "taint" on the jury would not be removed. Such failure to give thoughtful consideration to these or any other curative measures – to consider "all the circumstances" – was an abuse of discretion. *Perez,* 22 US at 579.

The fact that the only concern expressed by the prosecutor was that the credibility of its star witness might be tarnished if the jury found out that her friend might have lied is, perhaps,

indicative of the real motive behind the mistrial declaration. But it hardly constitutes the "very extraordinary and striking circumstances," *Downum,* 372 US at 736, creating the "high degree" of necessity, for a mistrial, *Washington*, 434 US at 506.

Indeed, it is a stretch to say that this jury suffered any "taint" at all, let alone an irreparable one. At its core, what happened here was a relatively unremarkable development; a party presented a witness who possibly lied about some minor facts. Witness credibility – of the complaint, the defendant, or of others who support either side – is routinely the lynchpin of the case. And it is hardly unprecedented for witnesses to lie, slant their testimony, give inconsistent statements, or simply present as less than credible. It is for the jury to determine whether some or all of the witness's testimony, is truthful based on a consideration of many factors, including "all the other evidence in the case, " which necessarily includes the veracity of other witnesses. M Crim JI 2.6(3)(h). Aiding the jury in that regard is the prosecutor's duty to correct testimony that is false (which it fulfilled here) as well as the right of cross examination, the "'greatest legal engine ever invented for the discovery of the truth.'" *California v Green*, 399 US 149, 158 (1970) (quoting 3 J Wigmore, Evidence § 1367 (3d ed 1940)); *see also, People v Parker,* 230 Mich App 677, 690 (1998) (presentation of false testimony did not violate due process when the defense was notified of the false statement and was able to cross examine the witness in question about it.)

The fact that the misrepresentations were made by a prosecution witness makes little difference. The function of a trial is to determine the truth and, every person's evidence is fair game for use and challenge before the jury. *Com v Pagan,* 597 Pa 69, 89; 950 A2d 270, 282 (2008); *cf also, United States v Nixon*, 418 US 683, 709 (1974). When the prosecution has made a decision to present evidence in its own case, due process requires that such evidence be subjected wherever possible to the tests of reliability provided for by the Sixth Amendment. *See eg, Davis v*

Alaska, 415 US 308 (1974); *Pointer v Texas*, 380 US 400 (1965). This includes exposing the highly relevant fact that a key *res gestae* witnesses like Ms. Street might have lied.

That this relevant evidence might, by extension, have a negative "impact" on the complainant's credibility, as the prosecutor and apparently the judge worried, is hardly a reason to terminate the trial. A trial is "a legal battle, a combat in a sense, and not a parlor social affair.'" *Hall v State*, 820 So 2d 113, 143 (Ala Crim App 1999), *sub nom. Ex parte Hall*, 820 So 2d 152 (Ala 2001) (internal quotations omitted). It is not like a friendly game of golf at which at which one of the contestants can ask for a "mulligan" when one of its witnesses does not testify as it would like. Indeed, the US Supreme Court itself has suggested that an abuse of discretion occurs when it appears "a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori*, 367 US at 369.

And whatever weight considerations of "fairness" to the complainant should be given in a mistrial calculation, it certainly should not outweigh a defendant's "valued right" to a single trial before a single jury, particularly where, as here, the structural integrity of the trial remained intact and it was only the strength of one party's case that might have been affected by the disclosure of relevant and admissible facts pertaining to a witness's credibility. Michigan's Crime Victim's Rights Act, MCL 780.751, et seq, affords complainants a number of procedural right, including the right to presence in court, to notice of certain events, and to meaningful participation in the sentencing process. It does not, however, require that a "victim's" rights are to be in any way considered by the trial court when deciding whether there is "manifest necessity" for a mistrial. Certainly, neither the statute, nor the Constitution, nor the common law give the complainant a superior right to halt a trial whenever a witness does not testify as she would like so that the prosecutor can have a "do-over". This is particularly so where, as here, the witness becomes the source of relevant and

admissible evidence that reflects on the credibility of the complainant herself. It is often stated that the defendant is entitled to a fair trial, but not necessarily a perfect one. *People v Mosko*, 441 Mich. 496, 503 (1992). So too, an accuser may have certain rights to fairness in the process; but she does not have the right to a perfect trial at which the prosecutor's case is pristine.

Nor was there manifest necessity for a mistrial to ensure "fairness" to Mr. Howard, particularly when his "valued right" to this jury was not considered. As noted above, alternative methods for correcting the misrepresentations were available and sufficient to cure any problem. Additionally, the misrepresentations pertained to minor, collateral matters that were hardly material to the case. Indeed, it is hghly unlikely that the jury would have been *more* likely to find Mr. Howard guilty if it mistakenly believed the liquor for the party came from "Campus Corners" rather than from somewhere else, or that Ms. Street made or could have made calls on her own phone rather than having to use someone else's. False testimony only requires retrial when there is a likelihood that it would affect the verdict. *See United States v Agurs*, 427 US 97, 103 (1976). It would not have here and this isnot a case where "a verdict of conviction could be reached but would have to be reversed on appeal." *Somerville*, 410 US at 464.

Indeed, correcting Ms. Street's misrepresentations and allowing cross examination of her would have actually made a conviction *less* likely. As the prosecutor fretted and as the court apparently feared, the jury would more likely have distrusted the complainant's claims had it known that her corroborating witness and close friend had been less than truthful. But the mistrial ruling denied the defense the opportunity for that to happen. At the second trial, Ms. Street did not testify and the defense lost the opportunity to challenge the credibility of the State's case through aggressive cross examination of her. In a way then, the mistrial declaration "operated as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." *Somerville,* 410 US at 469, *accord, Benton*, 402 Mich at 62.

Courts in other jurisdictions that have considered mistrial requests in response to the midtrial presentation of false testimony preponderate heavily against a finding of manifest necessity. In *United States v Ward*, 190 F2d 483, 491 (CA 6, 1999), a witness "perjured himself regarding collateral issues, [which] was brought to the attention of the jury by the defendants themselves when all three defendants were given virtually unlimited latitude to cross-examine [the witness] and other witnesses regarding the collateral matters about which [he] lied." The Court held that the witness's perjured testimony did not warrant a mistrial. *Id.* In so holding, the Court stated, "We know of no rule that stands for the proposition that, even with full cross-examination, the introduction of perjured testimony per se warrants a new trial." *Id.*

In *United States v Sanders*, 591 F2d 1293, 1298 (9th Cir 1979), the defendant's first trial ended in a sua sponte mistrial declaration by the trial court after the probability arose that a prosecution witness had committed perjury. The Court held that there was no manifest necessity for a mistrial:

> The judge's reason for declaring the mistrial was to avoid "prejudice as far as the defendant is concerned" from the "tainted" testimony of [the witness]. Yet, given that [the defendant] intended to attack the credibility of [the witness] and other witnesses, it is more likely that he would have benefitted rather than suffered from the "tainted" testimony. In any event, nothing in the record indicates that the judge considered alternatives to a mistrial which could have dispelled any perceived bias on the part of the jurors, such as allowing cross-examination of [the witness] or issuing a curative instruction.

Id. See also United States v Jackson, 327 F2d 273, 296-97 (4th Cir 2003) (trial court did not err in denying defendant's motion for a mistrial when prosecutor's witness's testimony was perjured, because defense subjected witness to "vigorous cross-examination" and the trial court offered a limiting instruction); *United States v Blair*, 958 F2d 26, 29-30 (2d Cir 1992) (witness perjury did not deprive defendant of fair trial because there was no reason to believe that the jury's verdict was

based on false testimony, witness was cross-examined, and a jury instruction was given regarding false witness testimony).

In other instances, federal circuit courts have held that false testimony by a witness, in combination with other prejudicial circumstances, warrants a declaration of a mistrial. However, standing alone, witness perjury has not been found to constitute manifest necessity. In *United States v Grasso*, 600 F2d 342, 342 (2d Cir 1979), the trial court declared a mistrial when a prosecution witness recanted his testimony after nine days of trial had passed, 53 witnesses had testified, and only one rebuttal witness was left to be called. This was not based on prosecutor misconduct or impropriety. *Id.* at 344. The mistrial declaration was based in part on its belief "that allowing the veracity of [the witness's] testimony to become the focal point of the trial would be unfair to the defendant in several ways[,]" including that "the defendant might have been convicted on 'perjurious testimony.'" *Id.* at 344-45. Ultimately, the court held that the trial judge could reasonably have found manifest necessity in this case based on a combination of all three grounds on which the trial court based its mistrial declaration. *Id.* at 345-346. Although the perjurious testimony was "the most justifiable" of the three grounds, and "had some weight as a ground for mistrial[,]" the court did not find that there was manifest necessity for a mistrial based on this ground alone. *Id.* at 345-46. The court held that evidence of the witness's recantation "would plainly have been admissible to impeach (or rehabilitate) the witness' prior testimony." *Id.* at 346.

> Although a recantation . . . may have a dramatic effect upon a jury, so may a devastating cross-examination or a strikingly contradictory prior inconsistent statement. If the danger of jury confusion of technical issues were itself so great in this case as to require a mistrial, what would be done with all the much longer and more complex trials routinely tried before juries?

Id. at 345. *See also Briggs v United States*, 221 F2d 636, 638 (6th Cir 1955) (trial court should have declared mistrial where government witnesses committed perjury, such action was publicized in

newspapers having general circulation in the area, and no instruction was given to the jury against possible prejudice from reading newspaper articles).

Here, as in *Ward* and *Sanders,* there was a single instance of false testimony. As in those cases, there was no "taint" that could not be corrected by several, easily available steps, and allowing the trial to continue would only further the search for the truth. The record reflects the trial court failed to give serious consideration, if it gave any consideration at all, to options short of a mistrial, or to Mr. Howard's "valued right" to one trial. The process leading to the mistrial declaration was far from the constitutionally-required "scrupulous exercise" of discretion, and the reasons cited for the ending the trial did not add up to "manifest necessity." Double Jeopardy barred retrying Mr. Howard.

II. Mere Silence Or Failure To Object Is Not Implied Consent To A Trial Court's Sua Sponte Declaration Of A Mistrial.

This Court has asked, "whether the statement in *People v Johnson*, 396 Mich 424, 432 (1976), that '[m]ere silence or failure to object to the jury's discharge is not such consent,' is an accurate statement of law." The short answer to that question is yes. When the *Johnson* Court made this statement originally, it did so by explicitly referring to the existing double jeopardy jurisprudence of the United States Supreme Court, and its decision was consistent with that of a majority of the states. It was also correct when made. The right to have one's case tried to a single jury is a "valued right" and requires more than mere silence to waive it faithful to the primary purpose of the Double Jeopardy Clause. The onus should not be solely on defense counsel to point out to the judge that there may not be manifest necessity for a mistrial: if the judge fails to inquire, the prosecutor could certainly be required to speak up to let the judge know that a precipitous declaration of a mistrial could prevent a retrial.

Not only was *Johnson* correct originally, nothing has happened since then to change this conclusion. Moreover, the principles of *stare decisis* militate against this Court overruling *Johnson* which has been the law of this state for over 40 years.

A. *Johnson* Got It Right. Requiring An Affirmative Action By Defendant Or Counsel To Infer Consent Keeps Primary Control Where It Belongs: With The Defendant.

In *Johnson*, this Court established that mere silence or a failure to object does not automatically constitute consent by a defendant to a trial court's *sua sponte* declaration of a mistrial. 396 Mich at 431-32. In doing so, the Court joined other states in choosing one of the competing interpretations of waiver in the mistrial and double jeopardy context. While the precise formulation of the rule relied on authority from other states, the underpinnings of *Johnson* were

the decisions of the United States Supreme Court in *United States v Dinitz*, 424 US 600 (1976) and *United States v Jorn*, 400 US 470 (1971).

The purpose of the Double Jeopardy Clause is to protect individuals from the power of the State, by preventing the government from using its resources to overwhelm a person through repeated prosecutions with the inherent embarrassment, expense and stress. *Dinitz*, 424 US at 607. For these reasons, the criminal defendant must retain primary control over the course to be followed. *Id.* at 609. Relying on *Dinitz,* this Court said that "the defendant must therefore do something positively in order to indicate he or she is exercising that primary control." *Johnson*, *supra*, at 432-433.

> In the absence of [a] brightline rule[] . . . , we must first look to whether in the exercise of that control of the course of his own trial, highlighted by *Dinitz*, [the] defendant . . . approved termination of the proceedings

Id. at 433. As the *Johnson* court found, "[I]t is not difficult to require a trial court to inquire whether a defendant consents.[1]" *Id.* Absent "an affirmative showing on the record, this Court will not presume to find such consent." *Id.*

Thus, the primary basis for this Court's holding in *Johnson* was *United States v Dinitz*. With this overarching principle in mind, the articulation of the rule stated in this Court's MOAA order and cited by the *Johnson* court relies on an Arizona Court of Appeals decision, *People v Fenton*, 506 P2d 665 (Ariz Ct App 1973). *Fenton* noted that while "some" courts required that the defendant object to the declaration, that court chose to follow the contrary view that "mere silence or failure to object to the jury's discharge is not such consent as will constitute waiver of a former jeopardy plea." *Id.* at 667. That statement remains the law in Arizona to this day.

[1] In fact, in 1993 the United States Supreme Court adopted Fed R Crim P 26.3 which requires courts to give the parties an opportunity to comment on the propriety of an order of mistrial, to state whether they consent or object, and to suggest alternatives. This Court has not promulgated a similar rule.

In a footnote, *Johnson* also cites two other state decisions. The first is a Pennsylvania Supreme Court case, *Commonwealth v Baker*, 413 Pa 105 (1964). *Baker* was a murder case where the jury had been discharged during deliberations. *Id.* at 384. In holding that double jeopardy barred a retrial on the most serious charges, the Pennsylvania court held "mere silence by defendant or his counsel . . . will not amount to a waiver of this very important constitutional right of every person accused of a capital offense." *Id.* at 387. The other state Supreme Court decision cited by *Johnson* is *Curry v Superior Court,* 2 Cal 3d 707 (1970). *Curry*, in turn, cites approvingly to lower California appellate decisions holding that a defendant has no obligation to object and "his mere silence in the face of an ensuing discharge cannot be deemed a waiver." *Id.* at 713. Elsewhere in the opinion *Johnson* also relies on *People v Compton*, 6 Cal3d 55, 63 (1971), repudiated on other grounds by *People v Fuiava*, 53 Cal 4th 62 (2012) ("mere silence in the face of an ensuing discharge [of a jury] cannot be deemed a waiver").

This same footnote also contains a citation with approval to the Michigan case of *People v Brown,* 23 Mich App 528 (1970), which stated, in this context, that "[s]ilence cannot operate against a defendant." *Id.* at 534. *Brown*, in turn, relied upon a Florida Supreme Court decision, *State ex rel Williams v Grayson*, 90 So2d 710 (1956), which itself was based on a line of Florida Supreme Court decisions standing for the same proposition. *Id.* at 534-535. *Brown* expresses concern about silence equating to consent of a waiver of a constitutional right on a confusing record.

These citations show that the *Johnson* court, with *Dinitz* in mind, was choosing to follow the line of state court decisions articulating an identical rule: mere silence or failure to object is not consent. None of the cases relied upon by *Johnson* for this specific proposition have been

overturned or limited.[2] Indeed, the Pennsylvania Supreme Court in *Commonwealth v Bartolomucci*, 468 Pa 338 (1976) reaffirmed its earlier decision in *Baker*, citing *Johnson* with approval. *Id.* at 239. *Bartolomucci* also noted that as of 1976 "a majority of jurisdictions do not view silence as consent." *Id.* Since *Johnson,* other states' supreme courts have adopted the same rule. *Cardine v Commonwealth*, 283 SW3d 641, 652 (Ky 2009)(requiring defendant to object to a mistrial "does not make sense."); *State v Bertrand*, 133 NH 843, 852 (1991)("a defendant generally cannot consent to a mistrial by silence"); *State v Ambrose*, 598 P2d 354, 360 (1979) (court held that mere silence or a failure to object did not constitute implied consent), repudiated on other grounds by *State v Harris*, 104 P3d 1250 (2004). Idaho has adopted what appears to be an amalgam rule requiring "something more than mere silence," but allowing consent to "be implied from a totality of the circumstances." *State v Stevens*, 126 Idaho 822 (1995)(quoting *State v Werneth*, 101 Idaho 241 (1980)). The states that have not followed Michigan's approach since *Johnson* have all largely done so based on the federal cases discussed below. Counsel has found no cases, however, in which a state supreme court has adopted a mere silence rule like *Johnson* and then overruled it based on the decisions of the federal courts of appeal.

Moreover, in the decades since *Johnson,* no United States Supreme Court opinion has called into doubt *Johnson*. *See, e.g. Kennedy*, 456 US at 682; *Washington*, 434 US at 505; *United States v Scott*, 437 US 82, 93-94 (1978); *Lee v United States*, 432 US 23, 32 (1977).

[2] A lower California court has "called into question the scope and extent of *Curry*." *Stanley v Superior Court*, 206 Cal App 4th 265 (2012). It noted, however, that it was bound by the decision. *Id.* at 287. It distinguished *Curry* on grounds that the case did not involve "mere silence" because defense counsel had affirmatively acted during discussions of the mistrial to lead the court to believe he was consenting. *Id.* at 288. In *Stanley*, the court stated "it is our view that, where, under all of the facts and circumstances, defense counsel leads the trial court to believe that counsel consents to a procedure which ultimately results in the declaration of a mistrial, the defendant cannot properly rely on *Curry* to argue that counsel's ultimate silence at the moment the mistrial is declared should be interpreted as a lack of consent." *Id.* at 281.

Nothing in this Court's decisions since *Johnson* compels a different conclusion. In *People v Benton*, 402 Mich 47, 55 (1977), this Court remarked:

> The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed." *Dinitz*, 424 US at 607-09. This Court, on the authority of *Dinitz*, has declared that the defendant must "do something positively in order to indicate he or she is exercising that primary control." *Johnson*, 396 Mich at 432-33. Defendant's silence or failure to object to a declaration of mistrial does not constitute the requisite affirmative showing on the record.

402 Mich at 54-55. Similarly, in *People v Hicks*, 447 Mich 819, 831-832 (1994), this Court noted:

> We note that the hallmark of consent is the defendant's retention of primary control over the course of his trial. *Dinitz*, 424 US at 609. The consent *Dinitz* envisioned manifests itself in a defendant's decision to forgo taking his case "to the first jury and, perhaps, end the dispute then and there with an acquittal." *Id.* at 608, quoting *Jorn*, 400 US at 484.

Although this Court's orders can carry precedential value, the one it entered in *People v McGee*, 469 Mich 956 (2003), did not undermine *Johnson's* rule that *mere* silence is not consent. In its order in *McGee,* this Court stated that "[t]he record in this case reveals circumstances from which consent to the [trial] court's declaration of a mistrial can be inferred." Presumably, this Court was referring not to defendant's silence or failure to object, but to a "slight nod" made by trial counsel in response to a judge's statement that it intended to declare a mistrial. *See People v McGee,* 247 Mich App 325, 329, n. 2. That "slight nod" was a communicative act that denotes consent. *Id.* at 329, n 2. This order supports only a conclusion that the Court of Appeals misapplied *Johnson*. Nothing more and nothing less.

In conclusion, the decision in *Johnson* has a strong basis in U.S. Supreme Court precedent. It remains a correct statement of the law.

B. The Law Has Not Changed Since *Johnson*. The Federal Decisions Cited By *Lett* Fictionalize Consent Without Regard for the Defendant's Right to Retain Primary Control Of The Proceedings.

In *People v Lett*, 466 Mich 206, 23, n 15 (2002), this Court explicitly reserved the issue of implied consent for another day. In this footnote, this Court cited a string of federal authorities: "See *United States v Aguilar-Aranceta*, 957 F2d 18, 22 (1st Cir 1992); *United States v Beckerman*, 516 F2d 905 (2nd Cir 1975); *United States v Phillips*, 431 F2d 949 , 950 (3rd Cir 1970); *United States v Ham*, 58 F3d 78, 83-84 (4th Cir 1995); *United States v Palmer*, 122 F3d 215, 218 (5th Cir 1997); *United States v Gantley*, 172 F3d 422, 428-29 (6th Cir 1999); *Camden v Crawford County Circuit Court*, 892 F2d 610, 614-18 (7th Cir 1989); *United States v Gaytan*, 115 F3d 737, 742 (9th Cir 1997); *Earnest v Dorsey*, 87 F2d 1123, 1129 (10th Cir 1996); *United States v Puleo*, 817 F2d 702, 705 (11th Cir 1987)."

These federal decisions are not sufficient to support overruling *Johnson*. First, two of the decisions cited by *Lett* predate both *Johnson* and *Dinitz*. They would presumably have been known to and rejected by this Court in 1976. The first is *United States v Beckerman*, 516 F2d 905 (2d Cir 1975). In setting forth its statement that the court should look to the totality of circumstances, it cited to another, even earlier, Second Circuit decision. *Id.* at 909. The second is *United States v Phillips*, 431 F2d 949 (3d Cir 1970). Perhaps because *Phillips* preceded both *Jorn* and *Dinitz*, in its very short decision the Third Circuit does not give any serious consideration to the defendant maintaining "primary control" over the decision, merely noting that if there had been an objection there would have been a "serious issue of double jeopardy." *Id.* at 950. Further, since *Phillips*, the Third Circuit in *Love v Morton*, 112 F3d 131 (3rd Cir 1997), addressed the issue of silence as consent without citing *Phillips*. In *Love,* the Third Circuit again stated that it will not infer consent from silence unless there was an adequate opportunity to object. *Id.* at 138. Close

cases, however, "'should be resolved in favor of the liberty of a citizen.'" *Id.* In *Love*, the mistrial had been declared because of the sudden death of the judge's mother-in-law. Double jeopardy precluded retrial because the judge had made no inquiry of counsel regarding the propriety of a mistrial, gave counsel only a few minutes notice of his intent to declare a mistrial, left immediately after doing so, and given the judge's personal circumstances the atmosphere in the courtroom was not conducive to an objection. *Id.* at 139

Second, all of the remaining federal decisions cited by *Lett* rely on the decisions only of the other federal circuit courts in reaching the conclusion that silence can sometimes be consent, excepting only that *Jorn* requires that there be an opportunity to object. The most substantive discussion, possibly because there is a dissent from Judge Posner, is the Seventh Circuit decision in *Camden v Circuit Court*, 892 F2d 610 (7th Cir 1990). The *Camden* court said that if the mistrial had been declared in front of the jury without an adequate opportunity to object, it would be "unfair" to infer consent "absent other circumstances." *Id.* at 615. Camden, however, had been given "a minimal but adequate opportunity." *Id.* In reaching its holding, the *Camden* majority distinguished another Seventh Circuit decision, *Lovinger v Circuit Court*, 845 F2d 739 (7th Cir 1988), on two bases. The first was that in *Lovinger* the judge had left too quickly. *Id.* The second is that in *Lovinger,* prosecutorial misconduct and incompetence had prompted the mistrial, meaning that things had been going the defendant's way. *Id.* at 615-616. "The record does not suggest in any degree that the court declared a mistrial to give the government a second opportunity to convict because the first attempt was going badly." *Id.* at 617. The "unique circumstances" of the case in *Camden* led to the implied consent finding. *Id.* at 618.

Perhaps the longest and most detailed defense of the "mere silence or failure to object" as not equating to consent comes in the dissent by Judge Posner in *Camden*:

> The first he learned of the judge's intention to declare a mistrial was when the judge declared the mistrial and excused the jurors. The lawyer could hardly have been expected to interrupt the judge while he was addressing the jury and say, "Wait a minute, judge, I don't want a mistrial." And once the judge had thanked the jurors and told them that they were excused and could go home, the lawyer could not jump up and say, "Wait a minute, judge, don't let them go." And after they were gone he could not shout, "Bring them back! Bring them back!" We should not require defense counsel, on pain of sacrificing a client's constitutional right, to make futile gestures – gestures that cannot lead to the rectification of error, because they come too late.

Camden, 892 F2d at 619-620 (Posner, dissenting). Posner notes that in *United States v Buljubasic*, 808 F2d 1260, 1265 (7th Cir 1987) the court (in an opinion written by Judge Easterbrook), held a defendant's silence would be consent "'if a judge should say, "I think a mistrial would be a good idea, but think this over and let me know if you disagree."'" *Id.* But, Judge Posner noted, the court had said no such thing, and that an objection would have served no purpose in *Camden*. Judge Posner also discusses the very practical dilemma an attorney would face in objecting to a mistrial after the jury has been told it is excused: requiring such an action risks antagonizing both the jury (being forced to remain) and the judge (being argued with in front of the jury). *Id.*

Judge Posner acknowledges the "concern with the strategic employment of silence" evidenced in the opinions rendered by other federal circuits. *Id.* Requiring an objection under the circumstances of *Camden* "makes consent a fiction." *Id.*[3] Judge Posner notes that there is an argument for fictionalizing consent, which is to require that defense lawyers warn judges that there may be a double jeopardy problem. This reasoning for fictionalizing consent appears to lie at the

[3] Judge Posner distinguished the two federal decisions cited by the majority from *Camden*. In one the attorney had forewarning of the declaration of mistrial, in the other there had been an interval between the declaration of mistrial and the discharge of the jury. *Id.* at 620. Counsel acknowledges that here the declaration of mistrial did not come in front of the jury, but would note that the judge did not ask counsel whether he objected and that at the time the mistrial was declared *Johnson* was clearly the controlling law in this state.

heart of the federal appellate court rulings. This reasoning, however, puts all of the responsibility for alerting the court of a problem on the defense, and none on the prosecution.

The Ninth Circuit decision cited in *Lett* was *United States v Gaytan*, 115 F3d 737 (9th Cir 1997). *Gaytan*, quoting its own decision and one of the Sixth Circuit, set forth the rule that "consent may be inferred 'only where the circumstances positively indicate a willingness to acquiesce in the mistrial order.'" *Id.* at 742. The Gaytan court affirmed the lower court's finding that there was *no* implied consent. Mistrial had been declared as a result of a *Brady* violation; the judge admonished the prosecutor and dismissed the case within seconds. *Id.* at 743. The jurors were not present, and not formally discharged until after they returned from lunch, and there was no discussion of future plans. *Id.* In reaching this conclusion, the Court relied upon *Dinitz*, *supra;* "The Supreme Court emphasized the importance of the opportunity for careful deliberation on the part of the defendant when prosecutorial error has occurred." *Id.* Careful deliberation is necessary to allow the defendant to retain "primary control over the course to be followed in the event of such error." *Id.* The opposite had occurred: the court was angry about the *Brady* violation and gave the parties no opportunity to consider or decide on a course of conduct. *Id.* The court then cited *Lovinger*, the same case distinguished by the Seventh Circuit in *Camden*, to stress that defendants must have the opportunity to assess fully their position at the time the mistrial is declared, not at some earlier point in time. *Id.*

In *Aguilar-Aranceta*, the First Circuit relied on its decision in *United States v DiPietro*, 936 F2d 6 (1st Cir 1991), which stated that "a mistrial may be inferred from silence where a defendant had the opportunity to object and failed to do so." *Id.* at 9. In *DiPietro*, the mistrial had been prompted by an improper argument by the prosecutor during his rebuttal closing. *Id.* at 7-8. Since they had discussed the error during a conference, the court found that counsel should have anticipated that a mistrial might be declared. *Id.* at 9. Later, counsel listened to the judge's

explanation of its decision to declare a mistrial without objecting, but renewed her motion for a judgment of acquittal. *Id.* at 11. Everyone remained in the courtroom, and the court had "no hint" that the defendant objected and "could not be expected to guess" it was declaring a mistrial over objection. *Id.* at 11. As authority, the First Circuit cited a number of other federal court of appeals decisions. *Id.*

In adopting the same rule, the Fourth Circuit in *Ham, supra*, ran through many of the same decisions cited in the *Lett* footnote, noting that it is the majority view in the federal courts. No state decisions are cited, and in a footnote *Ham* indicates that the only apparently different rule in the federal circuits is in the Sixth Circuit which "has actually not set a different standard." *Id.* at 83, n 3.

The Sixth Circuit's analysis in *United States v Gantley, supra,* too looked only to the decisions of its sister circuits in setting forth its own rule. In *Gantley*, the appellate court found silence to be consent where defense counsel had suggested the judge's reaction was "incurable prejudice," the court had considered and rejected alternative courses of action, and then "essentially invited" objection. *Id.* at 429. The court observed that while the Fourth Circuit in *Ham* suggested that the Sixth Circuit's requirement of a "positive indication" of consent was a narrower interpretation of implied consent than the test used in the other circuits, the Sixth Circuit's test was not, in fact, materially different. *Gantley,* 172 F3d at 428.

> Rather, this Circuit simply insists on an especially careful examination of the totality of circumstances, to ensure a defendant's consent is not implied when there is a substantial question of whether the defendant did, in fact, consent. Because there are "drastic consequences attached to a finding of consent" to a mistrial . . . we have refused to infer consent merely because a defendant did not object to the declaration of a mistrial. Rather, a defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent.

Id. at 428-429 (citations omitted). Like the other federal circuit courts, the Sixth Circuit did not mention any of the state court decisions reaching a different result, or point to any United States Supreme Court precedent that compelled this formulation of the rule.

The Fifth Circuit likewise looked only to the decisions of the federal circuit courts in setting down its rule that "[i]f a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried." *United States v Palmer*, *supra*, at 218 *citing United States v Nichols*, 977 F2d 972 (5th Cir 1992). *Nichols*, in turn, was adopting a rule that the Second Circuit had set forth before both *Johnson* and *Dinitz* in its decision in *United States v Goldstein*, 479 F2d 1061 (2nd Cir 1973). *Nichols,* 977 F2d at 974.

Earnest v Dorsey, 87 F3d 1123 (10th Cir 1996), a habeas decision, involved a finding of consent where the defendant had moved for a mistrial but then tried to withdraw it after it was granted. *Id* at 1129. The court distinguished other cases where the defendant had withdrawn the motions before they were granted, or had been led to believe they were not granted. "Earnest stood by his mistrial motions in the face of the trial court's explicit statements that the motions were under consideration, that they might not be granted, and even that they were not in his best interests." *Id.* Finding implied consent, the court relied upon *United States v Goldstein*, 479 F2d 1061, 1067 (2d Cir 1973) noting that "consent was implied where defendants moved for a mistrial and failed to communicate their alleged change in position to the trial judge notwithstanding adequate opportunity to do so."

Goldstein also formed the basis for the holding in the final federal decision cited by *Lett*, *United States v Puleo*, 817 F2d 702 (11th Cir 1987). "In this case where the trial judge expressed a clear intent to declare a mistrial and the defense counsel had an opportunity to object but did not,

we hold that Puleo has consented to the mistrial." *Id.* at 705. Consent thus could be "'implied from the totality of circumstances attendant on the declaration of a mistrial.'" *Id.* quoting *Goldstein*. The Eleventh Circuit said it "simply will not do for counsel to preserve an error for appellate review without giving the trial court a reasonable opportunity to render a decision upon the same objection." *Id.* Since counsel had an opportunity to object, consent would be implied.

Thus, the reasoning of the federal decisions appears not to be one of constitutional law, but rather one of fealty to the concern that defendant is "profit[ting] from his failure to act." *Ham*, 58 F3d at 84; see also *Camden, supra*, at 618. The fact that many state courts have placed more importance on the Supreme Court's statement that the defendant must retain "primary control," and thus concluded as this Court did in *Johnson* that "mere silence or failure to object" is not consent, is not discussed by any of these courts. Many of the federal court opinions are in fact based on decisions that predate *Johnson* and *Dinitz.* Indeed, only the Ninth Circuit discusses *Dinitz*, and says that *Dinitz* requires careful deliberation by the defendant to allow him to retain control. This concern led the Ninth Circuit in *Gaytan* to find that there was no implied consent.

In sum, the rule the federal courts have promulgated is not only circular in that they are only looking to, relying on, and discussing their own decisions on this subject, what they are doing is fictionalizing consent. They are not sufficient support for this Court overruling its own precedent.

C. Principles Of *Stare Decisis* Do Not Support Overruling *Johnson*.

In addition to the wealth of support for *Johnson*'s rule, there is no basis for abandoning it and stare decisis requires keeping it. This Court must respect and follow precedent and not overrule or modify it unless there is substantial justification for doing so. *Stare decisis* "is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual

and perceived integrity of the judicial process.'" *Robinson v Detroit,* 462 Mich 439, 463 (2000)(quoting *Hohn v United States*, 524 US 236, 251 (1998)). In *Robinson*, this Court set forth a test to determine when it is appropriate to depart from *stare decisis*. First, this Court must consider whether the previous decision was wrongly decided. *Id* at 464. Then, the Court applies a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case. These include (1) whether the decision defies practical workability, (2) reliance interests, and (3) whether changes in the law or facts no longer justify the decision. *Id.*

As discussed above, *Johnson* was not wrongly decided. This Court made the determination that it, like many other state courts, would take seriously the language in *Dinitz,* as well as tenant of the Double Jeopardy Clause, which is that defendants must maintain primary control over their case. Consistently with that, "mere silence or the failure to object" cannot be deemed an exercise of that power. The *Johnson* Court certainly would have been aware that the federal courts, including in some of the very decisions cited by this Court in *Lett,* and other state courts were adopting a different rule at the time. Simply because this Court would now reach a different conclusion does not mean *Johnson* was wrong. The line of federal appellate authority is not based on new United States Supreme Court authority. It tends to rely simply on other federal decisions, without any discussion of competing concerns or the decision in *Dinitz*. These cases should not be a basis for narrowing the protections offered to the citizens of this State by *Johnson.*

The federal courts controlling concern is that defendants will sit on their hands to create an appellate parachute. But as the *Johnson* court said and the Seventh Circuit has echoed, it is not difficult at all for judges to safeguard against this by directly asking defense counsel: "do you consent?" That simple question would prevent the problem. A rule, like Federal Rule of Criminal Procedure 23.6, requiring courts to inquire, ends the problem. And, at least in the context of *sua sponte* declarations of mistrials, placing the burden solely on the defense looks at the wrong party.

We have an adversarial system. The government is also harmed by an improper, *sua sponte* mistrial. The government has as much opportunity to object as defense counsel, and in many cases, more incentive.

Even if *Johnson* were wrongly decided, "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson*, *supra,* at 320. The three part test of *Robinson* does not support overruling *Johnson.* The decision in *Johnson* does not defy practical workability. All the judge needs to do is ask defense counsel if she consents, and state that not saying anything will be deemed consent. No change in the law or facts militate a change. While there is no reliance interest in the rule in cases that have not been tried, there certainly would have been at the time of this trial. Moreover, it is an established rule that Mr. Howard would have been entitled to rely on at his trial.

For these reasons, this Court should not overrule *Johnson.*

III. Analyzed Either Under A Strict *Johnson* Test, Or The Broad Totality Of The Circumstances Advocated By The Prosecution, Trial Counsel Did Not Implicitly Consent To The Grant Of A Mistrial.

Regardless of the test applied, consent is not shown from this record. Under *Johnson,* a positive act is required on the record. There is none here. The trial court expressed concern about the witness's veracity, and then there was a bench conference. Nothing in the subsequent disclosure of that conversation – the opportunity for the prosecution and the court to make a record – indicates that a mistrial ever came up. T 1 235-239. After the prosecution made a record of the bench conference and expressed his one and only concern, the trial court sua sponte declared a mistrial. T 1 235-39. Defense counsel did not speak. He was not asked if he consented to the mistrial. Counsel is merely silent. Later, when the issue comes up at sentencing, no one makes any statements suggesting that counsel had consented to the mistrial, on or off the record. In fact, defense counsel insisted he had not consented. S 16, 18. Under *Johnson*, consent cannot be implied on the existing record.

Using the broader test for implied consent used by the federal appellate courts, and advocated by the prosecution, the totality of the circumstances does not support a finding of implied consent either. Among those circumstances is the fact that *Johnson* had been the law for 40 years. Defense counsel's silence and failure to object should be evaluated with *Johnson* – and counsel's reliance on that precedent -- in mind. Counsel did not ask for a mistrial. There is no discussion on the record of a mistrial before it happens and no indication it was previously mentioned, either in the earlier in-chambers conference or in the two minute bench conference that immediately preceded the declaration of mistrial.

Another of the circumstances to consider is that the trial was obviously going badly for the prosecution. Ms. Street, who was called to buttress the complainant's version of events, became a

bit of a rogue witness. T 1 222-235. She "copped an attitude" on cross-examination and had to be admonished by the court and the prosecution. T 1 222, 235. Her answers had caused at least the court to question her veracity, and to tell the prosecution as much. T 1 222. When the court questioned her veracity again, the prosecutor did the right thing, notified the court of her deception, and candidly admitted that the misrepresentation might be hurting his case. T 1 234-238. But again, despite how badly things were going, when the prosecutor puts on the record what was discussed at the bench conference, a mistrial is not mentioned.

The first time the word mistrial is mentioned is when it is declared *sua sponte* by the court.

> My concern, frankly, is having this issue, which is an important issue, go to the jury with the status of this testimony and -- and this -- and this witness . . . Nothing that happened here is -- not only is not the fault of the Prosecutor or the police, but -- they have both been forthcoming with the Court. My concern is that the status of this testimony taints this jury to the degree that I don't think it's fair either to Mr. Howard or, frankly, to Ms. White's complaint to allow this matter to go to the jury on this basis.
>
> I'm going to declare a mistrial in this matter. Pretrial will be set for April the 8th at 1:30. Mr. Howard is due before the Court tomorrow on the other case that will proceed tomorrow. In the meantime, the Defendant's released on his own recognizance. Here are your exhibits. We're adjourned. I will inform the jury myself.

T 1 238-239.

The federal courts, applying their broader test, are far more reluctant to imply consent where, as here, the mistrial is declared to give the prosecution a chance to right its ship. See *Camden v Circuit Court*, 892 F2d 610, 617 (7th Cir 1990)("The record does not suggest in any degree that the court declared a mistrial to give the government a second opportunity to convict because the first attempt was going badly."); *Lovinger v Circuit Court*, 845 F2d 739 (7th Cir 1988); *United States v Gaytan*, 115 F3d 737 (9th Cir 1997). The immediacy of the mistrial declaration also militates against a finding of consent. The first record note of a mistrial is seconds before it is

declared, and counsel is given no opportunity to react. "The Supreme Court [in *Dinitz*] emphasized the importance of the opportunity for careful deliberation on the part of the defendant when prosecutorial error has occurred." *Gaytan* at 743. Careful deliberation is necessary to allow the defendant to retain "primary control over the course to be followed in the event of such error." *Id.* The quick move to a mistrial takes that primary control away because defendants must have the opportunity to assess fully their position at the time the mistrial is declared, not at some earlier point in time. *Id.*

The suspect reason for the mistrial and the quickness of the move to declare it along with silence on the record all weigh against a finding of implied consent under any test. In addition, at sentencing, when the mistrial is discussed, there is no suggestion that the defense acquiesced, and indeed there is a suggestion that defense counsel was not fully aware of the law regarding double jeopardy. S 16. For these reasons, consent should not be implied.

IV. Alternatively, Mr. Howard's Trial Counsel Was Ineffective For Failing To Raise A Motion For Dismissal Based On Double Jeopardy Before Mr. Howard's Second Trial; Because Counsel Was Ineffective, Mr. Howard's Convictions Must Be Vacated.

Mr. Howard's counsel failed to move in the trial court to dismiss his reprosecution after the improper declaration of a mistrial in his first trial. Counsel's failure to recognize this fact, and to file the appropriate motion deprived Mr. Howard of his constitutional right to the effective assistance of counsel. US CONST, Amends. VI & XIV; *see also Powell v Alabama*, 287 US 45 (1932); *Glasser v United States*, 315 US 60 (1942); *Gideon v Wainwright*, 372 US 335, 342 (1963). Likewise, Article 1, §20 of the Michigan Constitution provides that the accused in a criminal prosecution "shall have the right ... to have the assistance of counsel for his ... defense."

A claim of ineffective assistance requires not only that counsel's performance fell below an objective standard of reasonableness, but also that the counsel's performance so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668 (1984); *People v Pickens,* 446 Mich 298, 308-09 (1994). Counsel's assistance was ineffective when there is reasonable probability that, but for counsel's conduct, the result of the proceeding would have been different. *Id.*

Counsel's failure to file a motion to dismiss before the second trial falls below the *Strickland* objective standard of reasonableness. As discussed above, the law is clear that after the declaration of a mistrial, a defendant can be retried only if there is manifest necessity or the defendant's consent to the mistrial. There was no manifest necessity. There was no consent under the clear law set forth in *Johnson*. Counsel is presumed to know the law, including the law regarding double jeopardy (although his statements at sentencing suggest that counsel may not have known the law particularly well).

There can be no question as to whether the decision was part of counsel's trial strategy. *See People v Stanaway*, 446 Mich 643 (1994). If Mr. Howard's counsel had succeeded with a motion to dismiss on double jeopardy grounds, the prosecution would be barred from proceeding with the trial entirely. It is not sound strategy to have a trial go forward instead of filing a motion that would conclude immediately with the release of one's client. Furthermore, the detrimental effect rendered by trial counsel's failure to object is manifest: the second jury impaneled finally convicted Mr. Howard and he is currently in prison.

Accordingly, trial counsel was ineffective and his ineffectiveness prejudiced Mr. Howard.

Conclusion

This Court should grant leave and vacate Mr. Howard's conviction because the trial court declared a mistrial without either manifest necessity or his consent. This result obtains whether analyzed either as plain error or as ineffective assistance of counsel. This Court should also take the opportunity to answer the question left for another day in *Lett* and re-affirm the rule adopted in *Johnson*.

Respectfully submitted,

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_____

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